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9 IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
MANHATTAN DIVISION

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IN RE: ) BANKRUPTCY CASE NO. 12-12020-MG  
 ) CHAPTER 11  
 )  
RESIDENTIAL CAPITAL, LLC, ET AL. ) Jointly Administered  
 ) (Executive Trustee Services, Case No. 12-  
 ) 12028)  
DEBTOR.)  
\_\_\_\_\_)

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EXECUTIVE TRUSTEE SERVICES,) CLAIMANT'S PRE-TRIAL MEMORANDUM OF  
LLC, ) LAW  
\_\_\_\_\_)

18

REAL PARTY IN INTEREST.)  
\_\_\_\_\_)

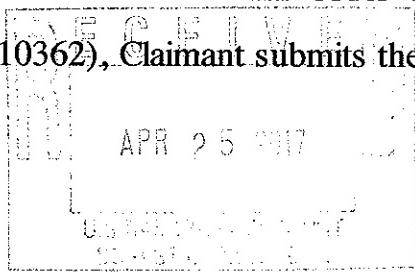
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Debtors.) Trial Date: May 8, 2017  
Hearing Time: 9:00 A.M.  
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Pursuant to the Pre-Trial Order entered in this matter on April 19,  
2017(Pacer Doc. # 10362), Claimant submits the following in conformance with Part  
XII thereof.



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**INTRODUCTION**  
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4 This matter is called for trial of Amended Claim No. 4445<sup>1</sup>, filed by  
5 Claimant in this bankruptcy action which controls the dismantling of the Residential  
6 Capital empire.<sup>2</sup> The Claim is based *solely* on a legal action filed by Claimant in the

7 \_\_\_\_\_  
8 <sup>1</sup> The Amended Claim, filed pursuant to Court Order on March 16, 2016, Pacer Doc.# 8334,  
9 incorporated the original Claim No. 4445. The original claim is contained in the record as Exhibit 1 to the  
10 Supplemental Horst Declaration, Pacer Doc. No. 7904-1, December 19, 2014. As used herein, the usage of  
11 the word “Claim” denotes the “Amended Claim” and its attached incorporated documents.

12 <sup>2</sup> In his opposition to ResCap’s Motion For Summary Judgment, Claimant asserted that the MSJ  
13 should not go forward because the bankruptcy court had yet to address the mandate of the District Court  
14 which had reviewed the ResCap’s objection to the Claim. On August 24, 2015, the Bankruptcy Court  
15 sustained the debtor’s objection to Claimant’s claim. On June 2, 2016, claimant’s appeal of that decision  
16 to the District Court was decided: the District Court *reversed and remanded* the Opinion of the Bankruptcy  
17 Court with instructions, to wit: “for further proceedings consistent with this Opinion.” The District Court  
18 noted that *inter alia* “ETS should not have conducted the foreclosure sale of the Property, but did so “in  
19 error,” according to the Trust, “due to a failure to timely communicate conditions that would have warranted  
20 a cancellation of the foreclosure.” In other words, ETS sold Moss’s property when it should not have,  
21 because of a “failure” to communicate, intentional or not, by an unidentified person to another unidentified  
22 person. The Trust’s statement obfuscates whether the failure to communicate was innocent, reckless or  
23 intentional and any role of ETS leading up to the improper sale.”(See Decision and Order, P. 15). The  
24 District Court further stated, “The Bankruptcy Court Opinion cites declarations and exhibits that, as  
25 discussed above, support a plausible finding that ETS acted “in reckless disregard of the plaintiff’s rights.,”  
which is a state of mind sufficient to show malice [citation omitted]. Consequently, the Bankruptcy Court  
erred in sustaining the objection and disallowing the Amended Claim ....”(*Id.* At 17)

26 To date, the Bankruptcy Court has taken no actions pursuant to the instructions of the  
District Court. The District Court questioned the analytical bases of the Bankruptcy Court in sustaining the  
debtor’s objection. Further, the District Court found that the requisite inquiry into the factual underpinnings  
of the claim was warranted and should be undertaken by the Bankruptcy Court. The District Court was  
troubled by the facts of this claim, and wanted further inquiry into the factual matters surrounding this claim.

It would be error to entertain a *subsequent* motion, based on different grounds, let alone a  
dispositive motion, prior to following the directions of the District Court contained in its Opinion, ordering  
a re-examination of its Decision. Should the Bankruptcy Court follow the dictates of the District Court, and  
render a finding that ETS acted with malice, the result would be that the Trust’s Objection to the Amended  
Claim would be denied, and consequently, the Amended Claim approved for the rolls. There would be no  
Motion For Summary Judgment.

Therefore, it is respectfully suggested that the instant Motion For Summary Judgment should  
be disallowed or tabled, and the Bankruptcy Court should re-visit its decision striking the claim from the rolls  
and issue a new decision consistent with the holding of the District Court. See *UTE Indian Tribe vs. State*  
*of Utah*(CA10, 1997) 114 F.3rd 1513 (“....a district court “must comply strictly with the mandate rendered

1 Superior Court of the County of San Mateo, California, *Moss vs. Executive Trustee*  
2 *Services, LLC*(hereinafter “ETS”).<sup>3</sup> The Complaint in that action contained three main  
3 causes of action: negligence (and derivative causes of action: negligence *per se* and  
4 negligent infliction of emotional distress ), fraud and intentional infliction of emotional  
5 distress; the Claim in this action mirrors these causes of action.<sup>4</sup>

6 The ETS action was filed when it was discovered, while working on a  
7 wrongful foreclosure case filed by claimant<sup>5</sup>, that ETS was never legally empowered to  
8 act as the trustee when GMAC wrongfully foreclosed on Claimant’s home. GMAC’s  
9 sole role was that it acted as the servicer on Claimant’s loan; as such, it was obligated  
10 to defend both ETS and BONYT. GMAC is, of course, ResCap prior to its name  
11 change. It was subsequently discovered during the ETS lawsuit that ETS was a wholly-  
12 owned subsidiary of GMAC, a relationship inherently inimical to the California statutes  
13 regarding trustees which place a duty on the trustee to treat both the beneficiary and  
14 trustor equally .

15 The record developed to date *conclusively* demonstrates, by way of *inter*  
16 *alia* discovery responses from ResCap, on behalf of both itself and ETS, that (1) ETS  
17 was illegally appointed to act as trustee, (2) took actions against Claimant which were  
18 illegal, and (3) violated California statutes controlling and dictating the role of trustees and

19 \_\_\_\_\_  
20 by the reviewing court ...[citations omitted]...Under the ‘law of the case’ doctrine, the district court may not  
deviate from the appellate court’s mandate.” This argument is respectfully renewed herein.

21 <sup>3</sup> Action No. 505386, Superior Court, County of San Mateo California.

22 <sup>4</sup> The Complaint is an attachment to ResCap’s Trial Exhibit 3, as set forth in the Pre-Trial Order.

23 <sup>5</sup> *Moss vs. The Bank Of New York Trust Company, N.A.*, Action No. 486130(2009), San Mateo  
24 County, California; this action was removed by BONYT to Federal District Court, Action No. 10-1734,  
25 (N.D. Cal, 2010), and then remanded back to San Mateo County when BONYT belatedly discovered it was  
a California corporation, thereby defeating diversity jurisdiction which was the basis of its removal.

1 actions it takes during foreclosure proceedings.

2 As such, there is no defense to this Claim: there is no defense for violating  
3 California law. ResCap, however, asserts as its single defense to the entire Claim, that  
4 Claimant was in default or at least late in one of his payments. As is or should be readily  
5 apparent, this is not a defense to a *negligence* action. California is a comparative  
6 negligence state and has been for over forty years<sup>6</sup>. Perhaps a late payment might be  
7 relevant to a determination of comparative negligence under California law, which can  
8 affect the determination of damages. It is pointedly not a defense to this Claim based as  
9 it is on negligence.<sup>7</sup>

10 Pursuant to the relevant statutes, an entity acting as trustee is required to  
11 issue three notices in perfecting a foreclosure of a deed of trust property.<sup>8</sup> The statute  
12 provides for immunity of a trustee in issuing these three notices—unless the trustee acted  
13 with “malice.” Throughout the litigation of this Claim, ResCap has attempted to  
14 obfuscate the Claim by inserting this question of malice. But this is error. The Claim is  
15 based entirely on the Complaint in *Moss vs. ETS* which is strictly an action founded on  
16 negligence, and not on issuing notices. While it is true that ETS issued notices while it  
17 illegally acted as trustee, the Claim merely alleges that ETS was negligent in failing to  
18 determine that it was illegally appointed, and not that it, at some point in time, mistakenly  
19 issued notices. As such, it is the position of Claimant that malice should not be part of  
20 this trial. The sole question before the Court is whether ETS was negligent.

21 The issues to be decided, and the order of deciding these issues, is as

22  
23<sup>6</sup> See *Li vs. Yellow Cab Co. Of California*(1975) 13 Cal.3<sup>rd</sup> 804.

24<sup>7</sup> This ETS action has been stayed by operation of law since the filing of this bankruptcy action.  
It is still pending on the Court’s docket in San Mateo County.

25<sup>8</sup> Notice of Default, Notice of Trustees Sale, Deed of Trust Upon Sale.

1 follows:

2           1. After it was (illegally) appointed as trustee, was ETS negligent when it  
3 failed to ascertain its lack of statutory power (and as a result rendered its issuance of  
4 statutory notices nugatory)?

5           2. After it was (illegally) appointed as trustee, was ETS negligent when it  
6 failed to ascertain its lack of statutory power that rendered its sale of Claimant's property  
7 at a trustee's sale (and thereafter issued a Trustees Deed Upon Sale) void?

8           3. After it was appointed as trustee, did ETS act fraudulently when it  
9 issued the notices and conducted the trustee's sale?

10          4. After it was appointed as trustee, did ETS intentionally inflict emotional  
11 damage on Claimant pursuant to California law?

12          5. Provided that the Court believes malice should be considered, and in the  
13 event that the response to any of the above four issues is in the affirmative, did ETS act  
14 with malice in being negligent, and/or acting fraudulently, and/or committing the tort of  
15 Intentional Infliction Of Emotional Distress.

16          6. In the event that the response to any of the above four issues is in the  
17 affirmative, and further that this was committed with malice if relevant, did this cause  
18 damage to Claimant, and if so, in what amount.

19

20           I.

21           **UNDERLYING FACTS RELEVANT TO THIS CLAIM AND TRIAL THEREOF**

22

23          This Claim resulted from, and is specifically based on, the law suit against  
24 ETS. The Claim specifically incorporated the Complaint as a basis for this Claim. The  
25 ETS complaint detailed the chain-of-title of the underlying loan, based on officially  
26

1 recorded documents, and demonstrated that ETS was not properly substituted in as a  
2 trustee of the loan: under California law, an entity may be substituted in as trustee,  
3 provided that the present beneficiary(ies) record the substitution. In this case, as can be  
4 seen from the recorded documents, it was TCIF who recorded a Substitution of Trustee,  
5 on November 10, 2006, naming ETS as the trustee. TCIF was not the beneficiary  
6 at that time, and would not become the beneficiary until assigned the loan for at least  
7 seven more months, until June 16, 2008. Chronologically, this can be put succinctly  
8 thusly:

**CJ MORTGAGE(6/22/05)[ORIGINAL LOAN]**

11

Assigned To **OPTION ONE MORTGAGE**

(BY ASSIGNMENT FROM CJ MORTGAGE DATED 6/27/05, RECORDED 4/4/07)

1

**OPTION ONE** SUBSTITUTES NEW TRUSTEE

PREMIER TRUST DEED SERVICES (10/26/05, RECORDED 2/3/06)

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**TCIF REO2, LLC, AS BENEFICIARY, SUBSTITUTES NEW TRUSTEE**

**EXECUTIVE TRUSTEE SERVICES, LLC ("ETS") (9/21/06, RECORDED 11/10/06)**

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**NOTICE OF DEFAULT ISSUED BY ETS ON BEHALF OF TCIF REO2, LLC**

9/17/07, RECORDED 9/18/07)

11

Assigned To TCIF, LLC

(BY ASSIGNMENT FROM **OPTION ONE** DATED 5/7/08, RECORDED 6/16/08)

11

1                   Assigned To **THE BANK OF NEW YORK TRUST COMPANY**  
2                   (By Assignment From **TCIF, LLC** dated 4/29/08, Recorded 6/16/08)

3                   ↓

4                   **NOTICE OF TRUSTEES SALE** issued by **ETS**(5/19/08, recorded 5/22/08)

5                   ↓

6                   **TRUSTEES SALE** conducted by **ETS** 5/7/09

7                   ↓

8                   **TRUSTEES DEED To BONY By ETS**(5/7/09, RECORDED 5/18/09)

9  
10                  The ETS lawsuit alleged that, *inter alia*, ETS was negligent when it failed  
11 to determine that it had been legally substituted in as trustee of Claimant's note. It was  
12 in that role that ETS issued the requisite notices required by California law to promulgate  
13 a foreclosure proceeding, to wit: (1) Notice of Default, (2) Notice of Trustee Sale, and  
14 (3) Trustees Deed Upon Sale. As can be seen from the diagram, ETS was made trustee  
15 by an entity that would *not* be assigned the loan for almost two years. Thus, TCIF had  
16 no power to substitute ETS, and therefore ETS had no power to issue any of the three  
17 notices. And BONY was assigned the loan by TCIF, LLC who had not yet been  
18 assigned the loan, and so had no ownership rights and no power to instruct ETS to  
19 foreclose.

20                  ResCap concedes that ETS was illegally appointed and agrees that ETS had  
21 no power to issue any notices required by statute.<sup>9</sup>

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24                  <sup>9</sup>The Trust's response to Interrogatory no. 2 states: "According to the relevant assignments, it appears that TCIF  
25 REO2, LLC did not have the authority to substitute a trustee at that time. As a result, the Borrower Trust does not claim  
that Executive Trustee Services, LLC was lawfully appointed as Trustee of Deed of Trust No. 15070373 at that time." A  
similar response was received as to Request For Admission No. 15 and 27. These documents are part of Claimant's exhibit  
list.

1           Because the entity(TCIF) which substituted ETS was not the beneficiary,  
2 and would not become the beneficiary, if at all, for eighteen months , ETS could not have  
3 had any reasonable grounds for believing that it had been properly appointed as trustee.  
4 ETS received no communication, either written or oral, demonstrating to it that the entity  
5 which named it as trustee had the power to do so. ETS received no communication,  
6 either oral or written, that demonstrated to it, or to any other reasonable individual or  
7 entity, that it was legally substituted in as trustee. ETS made no inquiry of recorded  
8 documents in order to verify that it was legally entitled to issue any notices or even if the  
9 entity that named it trustee existed or was the beneficiary or had the power to do  
10 anything. ResCap has not produced a *single piece of paper* that demonstrated that ETS  
11 was instructed to initiate and finalize foreclosure of Claimant's home. ETS has admitted  
12 in verified discovery responses that it performed no due diligence to ascertain whether  
13 or not it had been illegally appointed to act as trustee. ETS cannot produce any evidence  
14 that it attempted to determine its status by checking the website of the San Mateo County  
15 Recorder—a process that would have taken less than five minutes.

16           Further, in the underlying case against BONYT, GMAC/ResCap made four  
17 separate motions to dismiss pursuant to FRCP 12(b)(6); as a result of these motions,  
18 the latest and operative complaint, the Fourth Amended Complaint, contained a cause of  
19 action for Intentional Infliction of Emotional Distress, which remained a viable cause of  
20 action, the District Court denying the motion to dismiss as to this cause of action. *See*  
21 *Moss vs. BONY*, Action No. 10-1734(N.D. Cal.), Order, p. 3 AT 5-11, dated February  
22 16, 2012, ECF Doc.# 94.<sup>10</sup>

23           Under this fact situation, the issue of "malice" should not come up for  
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25           <sup>10</sup> *See* Claimant's Exhibits 40 and 41.  
26

determination: this Claim is not based on the issuance of statutorily-required notices, but rather on simple negligence in the failure to determine authority to act. However, if it is determined that malice or lack thereof is relevant to this claim, ETS lacked reasonable grounds for believing that it had the power to issue any requisite notices, or in the truth of the information contained in the notices it issued and therefore acted in reckless disregard of the rights of claimant. ETS acted in reckless disregard of the rights of claimant from the initiation of litigation in July 2009 up to, and including, the present time. ETS possessed no information, at no time, that it had been properly substituted as trustee, and despite years to ascertain the truth, and despite having been placed on notice that it had no power to act as trustee, failed to take any steps or to make any inquiry regarding whether it had been properly appointed and substituted. Therefore, ETS lacked any grounds, let alone reasonable grounds, to believe it had the power to issue any requisite notices in this matter, and therefore ETS acted in reckless disregard of the rights of claimant.

III.

## **THE ELEMENTS OF EACH CLAIM, THE LAW, AND EVIDENCE**

17                   The Trust goes to great lengths to try to eliminate the causes of action of  
18 the ETS complaint. In effect, the Trust argues that it is of no moment that ETS violated,  
19 directly, distinctly and *admittedly*, the controlling statutes on trustees in foreclosure  
20 proceedings; it does not matter, the Trust argues, because Claimant was in default. Put  
21 more succinctly, the Trust argues that if a noteholder is one payment behind, that is  
22 sufficient, in and of itself, to render the California Civil Code absolutely nugatory. That

1 is not the law, and cannot possibly be the law.<sup>11</sup>

2 In California, the power of sale allowed in a non-judicial foreclosure  
3 process is a creature of statute<sup>12</sup>, and any attempt to invoke the power of sale must be  
4 strictly construed in order to insure compliance with these statutory requirements:

5 "The power of sale under a deed of trust will be strictly construed, and in its execution the  
6 trustee must act in good faith and strictly follow the requirements of the deed with respect  
7 to the manner of sale. The sale will be scrutinized by courts with great care and will not be  
sustained unless conducted with all fairness, regularity and scrupulous integrity." *Pierson vs.*  
*Fischer*(1955) 131 Cal.App.2<sup>nd</sup> 208, 214.

8 "Statutory provisions regarding the exercise of the power of sale provide  
9 substantive rights to the trustor and limit the power of sale for the protection of the  
trustor. (*Ibid.*)" *Bank of America, N.A. vs. La Jolla Group II*(2005) 129 Cal.App.4<sup>th</sup> 706.

10 "No nonjudicial foreclosure of a security interest in real property is permitted  
11 except in compliance with this statutory system. Cal.Civ.Code §2924....Strict compliance  
with the statutory requirements is obligatory: any statutory deficiency requires that the sale  
be set aside., *Anderson vs. Heart Federal Savings*(1989) 208 Cal.App.3<sup>rd</sup> 202." *In Re Tome*  
12 (1990) 113 B.R. 626, Bkrtcy C.D. Cal.

13 By reviewing the chronology of events in this case, it is indisputable that  
14 the entity which "substituted" ETS as trustee and attempted to "game the system" so as  
15 to empower ETS with the power of sale, had no authority or power to do so. ETS could  
16 have easily and readily discovered its lack of power in five minutes on-line at the website  
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19       <sup>11</sup> California Civil Code §3541 states: " An interpretation which gives effect is preferred to one which makes void." Further "A statute should never be construed so strictly as to render it absurd or nugatory." *In re Los Angeles Lumber* (DC Cal 1942) 45 F.Supp.77, "Statutes should be construed as to make them effective or operative rather than inoperative. *Van Dorn vs. Couch*(1937) 21 Cal.App.2d Supp 749.

20  
21       The court in *Residential Capital vs. Cal-Western Reconveyance*(2003) 108 Cal.App.4th 807 held that, in a case involving interpretation of the California foreclosure statutes, must be "...determined by "principles of interpretation of the statutory scheme setting forth the rules of trust deed nonjudicial foreclosure sales." *Id.* at P.172. See also *California Golf, L.L.C. v. Cooper*(2008) 163 Cal.App.4th 1053, 1070-1071 [availability of particular remedy determined by consideration of "the policies advanced by the statutory scheme, and whether those policies would be frustrated by the allowance of the additional remedy"]; *I.E. Associates v. Safeco Title Ins. Co.*(1985) 39 Cal.3d 281, 285; *Moeller v. Lien*(1994) 25 Cal.App.4th 822, 834. Thus, "[t]he trustor is protected from unauthorized foreclosure and loss of its property and the sanctity and finality of foreclosure sales is maintained without significant prejudice to the high bidder." See also *Pro-Value Properties vs. Quality Loan Service Corp.*(2009) 170 Cal.App.4th 579.

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25       <sup>12</sup> Civil Code §§2924 - 2924h.

1 of the Recorder of San Mateo County.

2 **A. THE NEGLIGENCE CLAIM**

3 The elements of negligence generally are (1) duty, (2) proximate cause, and  
4 (3) damages.

5 **1. ETS, AS A TRUSTEE ACTING PURSUANT TO CALIFORNIA CIVIL CODE**  
6 **§2924, UNEQUIVOCALLY OWED CLAIMANT A DUTY**

7 Under California law, the trustee has a duty to the Claimant herein, as an  
8 *equal agent of both the trustor and the beneficiary*. “As a common agent, the trustee  
9 must represent the interests of both parties.” *Ainsa vs. Mercantile Trust Co. Of San*  
10 *Francisco* (1917) 174 Cal. 504, 510; *Ballengee vs. Sadlier* (1986) 179 Cal.App.3<sup>rd</sup> 1,  
11 5; *Kerivan vs. Title Ins. & Trust Co.* (1983) 147 Cal.App.3<sup>rd</sup> 225, 229; Miller And  
12 Starr, *California Real Estate*, 3<sup>rd</sup> Ed., §§10.4, 10.117<sup>13</sup>; Bernhardt, *Mortgages, Deeds*  
13 *of Trust, and Foreclosure Litigation*, 4<sup>th</sup> Ed., §2.26 .<sup>14</sup> 48 California Forms of Pleading  
14 and Practice §555.57 (1) (a).

15 Moreover, “The trustee is liable to the parties for all damages resulting from  
16 its wrongful acts contrary to the terms of the deed of trust if its conduct is negligent,  
17 fraudulent, or illegal. For example, a trustee may be liable for damages for any  
18 unauthorized re-conveyance....” *Id.* citing *Kerivan supra, Fleisher vs. Continental Aux.*  
19 *Co.* (1963) 215 Cal. App.2<sup>nd</sup> 136, 140; *Woodworth vs. Redwood Empire Sav. & Loan*  
20 *Assn.*(1971) 22 Cal.App.3<sup>rd</sup> 347, 366; *Bank of Seoul & Trust Co.* (1988) 198 Cal.App.3<sup>rd</sup>

21  
22 <sup>13</sup> “A trustee may be liable for damages for wrongful reconveyance. The trustee is a common agent of both parties  
23 and is liable for any losses suffered as a result of any intentional or negligent breach of trustee duties.” citing *Carter vs.*  
*Continental Land Title Co.* (1991) 233 Cal.App.3<sup>rd</sup> 1597, 1599.

24 <sup>14</sup> “The trustee has a *duty* to conduct the sale fairly and openly, with due diligence and sound discretion to protect  
25 the rights of the trustor and others...” citing *Baron vs. Colonial Mortgage Service Co.*(1980) 111 Cal.App.3<sup>rd</sup> 316, 322;  
*Kleckner vs. Bank of America* (1950) 97 Cal.App.2<sup>nd</sup> 30, 33.

1 113, 118.

2 The Court in *Kerivan* stated:

3 "In *Woodworth vs. Redwood Empire Sav. & Loan Assn.* (1971) 22 Cal.App.3<sup>rd</sup>  
4 347, 366, the court stated as follows: "It is well established, however, that a  
5 trustee under a deed of trust is not a trustee in the technical sense. Rather, he is  
6 the agent of all the parties to the escrow at all times prior to performance of the  
7 conditions of the escrow and *bears a fiduciary relationship to each of them.*"

8 As an agent, the trustee may be liable for negligence in the performance of  
9 his duties. This principle was found applicable in *Munger vs. Moore* (1970) 11  
10 Cal.App.3<sup>rd</sup> 1 where the court stated:

11 "That rule is that a trustee.....may be liable to the trustor.....for damages  
12 sustained where there has been an illegal, fraudulent or willfully oppressive  
13 sale of property under a power of sale contained in a mortgage or deed of  
14 trust. An agent has the duty to use reasonable skill and diligence and *if he  
15 violates this duty*, he is liable for any loss which his principal may sustain as  
16 the result of his negligence." *Dahl-Beck Electric Co. vs. Rogge* (1969) 275  
17 Cal.App.2<sup>nd</sup> 893."

18 As best as can be understood, Debtor argues that it owed no duty to  
19 Claimant and therefore cannot be found negligent. Debtor relies for its argument that  
20 ETS did not owe a duty to Claimant on *Kachlon vs. Markowitz* (2008) 168 Cal.App.4<sup>th</sup>  
21 316, a case founded on a will contest.. This case is inapposite at best in this regard, but  
22 what is abundantly clear is that whatever the trustee or substituted trustee did in  
23 *Kachlon*, it had the power to do it because it had been properly appointed. That is  
24 pointedly not the case here. Nothing in *Kachlon* stands for the proposition that a trustee  
25 does not owe a duty to trustor. Quite the contrary is true; if improperly appointed, the  
trustee has no power to do anything, and any actions it takes are void *ab initio*. *Dimock*  
*vs. Emerald Properties* (2000) 81 Cal.App.4<sup>th</sup> 868.<sup>15</sup>

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<sup>15</sup> Given the Trust's argument in this case, it is interesting to note that in another case, it argued just  
28 the opposite: that the trustee did have a duty to it, where ResCap was the plaintiff. See *Residential Capital*,

1                   **2. ETS BREACHED THE DUTY IT OWED TO CLAIMANT.**

2                   Although the Trust does not argue that it did not breach its duty owing to  
3 claimant, it bears repeating here. It is beyond doubt that ETS was not properly  
4 substituted in as the new trustee, and therefore had no power to issue the requisite  
5 notices or to conduct the sale or to issue the trustee's deed.<sup>16</sup> The entire chain-of-title  
6 documents clearly demonstrating the lack of authority of ETS is included in Claimant's  
7 trial exhibits (and most of the Trust exhibits). There is no objection to any of them.

8                   A leading treatise on California real estate, Bernhardt, *California Mortgages,*  
9 *Deeds of Trust and Foreclosure Litigation*, 4<sup>th</sup> Ed., §2.25 states: "A party who is not a  
10 trustee of record will not have the authority to conduct the foreclosure or deliver a valid  
11 trustee's deed." *See also Pro Value Props., Inc. Vs. Quality Loan Service Corp.* (2009)  
12 170 Cal.App. 4<sup>th</sup> 579.

13                   The debtor cannot argue that it would have been too difficult to discover  
14 that it did not have the power of sale (as in *Kachlon*). As it states in its brief, it set forth  
15 recorded documents which are easily obtainable online. It admits that ETS did not  
16

17 *LLC vs. Cal-Western Reconveyance*(2003) 108 Cal.App.4th 807. The Court summarized ResCap's argument  
18 thusly: " Residential Capital relies on this authority to argue that the trustee and beneficiary have a duty to  
19 third party buyers to exercise ordinary care in verifying the status of pending foreclosure sales before they  
20 go to auction." *Id.* at P. 176. This is Claimant's argument precisely. The Court held that there was a duty  
"...of a foreclosing trustee to ensure the sale is fairly conducted, according to proper procedures..."[citation  
omitted]. This duty runs to both the beneficiary and the trustor."

21                   <sup>16</sup> As set forth above, the entity who attempted to substitute in ETS was not yet the beneficiary, and wouldn't  
22 become the beneficiary for a year, and had no power to do so. Therefore, ETS could not do anything: it had no power. "No  
23 non-judicial foreclosure of a security interest in real property is permitted except in compliance with this statutory system.  
Cal.Civ.Code §2924....Strict compliance with the statutory requirements is obligatory: any statutory deficiency requires that  
the sale be set aside, provided that the purchaser is not a bona fide purchaser for value without notice of the deficiency.  
*Anderson vs. Heart Federal Savings*(1989) 208 Cal.App.3<sup>rd</sup> 202." *In Re Tome* (1990) 113 B.R. 626, Bkrtcy C.D. Cal.

24                   Because ETS was not duly substituted in as the trustee, ETS had no authority, *ab initio* or ever, to this day, to  
25 issue the Notice of Default, or the Notice of Trustees Sale, or the Trustees Deed by which defendant purports to claim title.  
ETS was named as trustee in derogation of this statute, because it was not named or substituted by a beneficiary of the deed  
of trust.

1 conduct any due diligence in this regard. It admits that there are no documents that  
2 demonstrate that ETS conducted any kind of investigation in this regard. Claimant's list  
3 of exhibits includes the discovery responses of the REsCap.

4 **3. ETS'S BREACH CAUSED HARM TO CLAIMANT**

5 The starting (and the ending point) on this issue is the latest California case  
6 on the subject: *Yvanova vs. New Century Mortgage*(2016) 62 Cal.4th 919, wherein the  
7 Supreme Court stated: "If there is a void assignment, then there is wrongful foreclosure  
8 because there is no power. When property is sold at the trustee's sale at the  
9 direction of an entity with no legal authority to do so, the borrower has suffered a  
10 cognizable injury."

11 The Trust argues that damages did not flow from anything that ETS did,  
12 stating in prior papers that "because ETS's recording of the Notices did not cause the  
13 commencement of the foreclosure process, ETS's actions cannot be the cause of Mr.  
14 Moss's alleged damages." This is a patently false and disingenuous statement. Under  
15 the statute, it was the recording of the notice of default that did cause the  
16 commencement of the foreclosure process. See Cal. Civil Code §2924a. Otherwise,  
17 under the statute, the process doesn't start. It is precisely because ETS filed the  
18 Notices, without authority—easily discovered—and evidently without being requested to  
19 do so by the beneficiary—actually the alleged beneficiary, since that assignment was also  
20 erroneously done—that the process started and continued to finality.<sup>17</sup>

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21  
22 <sup>17</sup> As explained above, before ETS could issue any notices or conduct a property sale, it had to first ascertain  
23 whether it was *empowered* to act as the lawful trustee to actually do these acts. This was neither a difficult task, nor so  
24 convoluted that ETS could not have figured it out or done it. After all, this was their business, and on information and  
belief, it existed solely to service the actions of ResCap. All they had to do was go online and look at the very recorded  
documents that debtor has attached in support of its instant motion. And evidently, all that ETS did, as a wholly-owned  
subsidiary of ResCap, was to initiate and carry out this process.

25 The fact is, as explained above, was that ETS was not duly substituted in as trustee, and would not, for at least  
a year, be so empowered—if then.

26 To hold otherwise would be to conclude that an entity could act as trustee without ever checking on who had To

1           Further, debtor's rendition of the facts is also erroneous and disregards the  
2 litigation below. ETS went ahead with a sale of claimant's home *after* claimant and  
3 ResCap entered into an agreement, complied with by claimant, that took the matter out  
4 of default. ETS totally, for whatever reason, disregarded this and went ahead with the  
5 sale. It took four years plus to undo ETS's illegal actions.

6           Lastly, debtor makes the uninformed statement that Claimant did not pay  
7 his mortgage(it wasn't a mortgage) which resulted in the commencement of foreclosure  
8 and therefore can't show that his damages were caused by ETS. First, there is no  
9 authority for this statement, and none can be given because it isn't the law . Second, at  
10 the time of the foreclosure, there was no default and debtor has merely argued a heresay  
11 statement. As pointed out above, the debtor has admitted that there was supposed to be  
12 no sale. Third, even if there was a default, that cannot possibly excuse a violation of  
13 California law, especially where it has been repeatedly held that the procedural aspects  
14 of the foreclosure process must be "strictly adhered to." Is the debtor's argument  
15 something like "Because Claimant *supposedly* missed a payment(s), we could then violate  
16 California law?" If a negligent driver sustains injuries as a result of his driving, is that  
17 a defense as to a physician who thereafter negligently treats him for those injuries? Of  
18 course not.

19           The Trust primarily relies on *Bergman vs. Bank of America* (ND Cal 2013)  
20 2013 WL 5863057. First this is a pleading stage case, so that the standards are quite  
21 different from deciding a summary judgment motion. Second, the Trust misrepresents  
22 \_\_\_\_\_

23 hold otherwise would be to conclude that an entity could act as trustee with-out ever checking on who had appointed them,  
24 when, and whether they had such power to affect so dramatically peoples lives. Some entity, whether or not the owner of  
25 a loan, could just place a call or write a letter and say "Start the foreclosure process. Send out a notice." Of course, that  
cannot possibly be the legislative intent when these statutes were adopted, and especially where the process is supposed to  
be strictly adhered to.

1 the holding of this case. It quotes language to support its argument that only applies to  
2 Bank of America, the beneficiary in this case, and not to the trustee, Trustee Corps. As  
3 to the trustee, the Court stated and held that: “Plaintiffs have not plausibly alleged that  
4 Trustee Corps *was aware, or should have been aware, that it was not validly the trustee*  
5 *when it recorded these documents....because Bank of America was not the beneficiary,*  
6 *and thus Trustee Corps was not the trustee, at the time the SOT was exe-*  
7 *cuted....plaintiffs have not pled facts to suggest that Trustee Corps should have been able*  
8 *to discover Bank of America’s alleged lack of authority.” That is decidedly different than*  
9 *this claim where it is specifically alleged *and factually certain* that ETS could have easily*  
10 *discovered it was not properly and legally substituted as the trustee.*

11 Further, inherent and subsumed in the holding of the District Court in  
12 *Bergman* is the conclusion that *if Trustee Corps could have discovered it was not*  
13 *properly substituted as trustee, the result would have been different.* It is patently clear  
14 from the facts of this case that Trustee Corps could not have possibly discovered this  
15 fact from the evidence available to it. *There is no factual dispute in the instant Claim*  
16 *that ETS could have discovered their lack of authority in five minutes.*

17 The Trust’s further argument re: *Bergman*, that an *alleged* default (there is  
18 a dispute about this, which the Trust keeps throwing around as a proven fact) gave the  
19 “owner of his loan” (the Trust uses this language because it was not the owner of the  
20 loan when it supposedly commenced the process—BONY was improperly assigned the  
21 loan and it was of no force or effect), the right to commence foreclosure proceedings.  
22 The Trust does not, and cannot, argue that this fact alone gave an entity the right to  
23 violate California law, as it did here.

24 Lastly, a part of this Claim (attached to the Trust brief at Exhibit N) is the  
25 Declaration of the undersigned that was filed in San Mateo County Superior Court as part  
26

1 of the process in obtaining a default judgment.<sup>18</sup> The harm to Claimant flowed not only  
2 from the foreclosure process itself, but from the actions of what can only be called  
3 thugs, hired by ResCap and ETS, to attempt to frighten Claimant out of his  
4 home—including disobeying a Court Order, attempting to proceed with an eviction  
5 proceeding notwithstanding that it had been stayed previously by the Superior Court. If  
6 the Claimant had not suspected this attempt and appeared, ResCap would have obtained  
7 such an Order, and done so in part on the proven lies under oath of the process server  
8 who never served the appropriate papers. ResCap attempted to circumvent the law, and  
9 had it been successful, would have been impossible to unravel. This is all demonstrated  
10 by Claimant's declaration in that action.

11                  **4. NEGLIGENCE *PER SE***

12                  The Trust objects to the negligence *per se* cause of action notwithstanding  
13 it was not part of its request for a summary judgment motion. Essentially, it argues for  
14 the reasons previously stated, that there is no duty owed on the part of ETS. This is a  
15 separate cause of action, based on a violation of statute. There was a clear violation of  
16 statute, and this cause of action is valid for all of the reasons stated above.

17                  **5. EMOTIONAL DAMAGES LIE EVEN ABSENT PHYSICAL HARM/  
18 NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**

19                  The Trusts protestations notwithstanding, physical harm is not a  
20 requirement in California to be awarded damages for negligent infliction of emotional  
21 distress. California recognizes a right to recover damages for serious emotional distress  
22 in a negligence action. *Molien vs. Kaiser Found. Hosp.*(1980) 27 Cal.App.3<sup>rd</sup> 916, 930.  
23 A plaintiff may recover general damages for emotional distress, pain and suffering, along  
24

25                  <sup>18</sup> See ECF Doc. # 10290-15, filed as part of this instant motion.

1 with other compensatory damages. *Merrill vs. Los Angeles Gas & Elec. Co.*(1910) 158  
2 Cal. 499, 511; *Niles vs. City of San Rafael* (1974) 42 Cal.App.3<sup>rd</sup> 230, 244. See Witkin,  
3 4 *Summary of California Law*, 10<sup>th</sup> Ed. §1022.

4 Negligent infliction of emotional distress refers to the recovery of damages  
5 by a plaintiff who has not otherwise suffered any physical or bodily injury, for emotional  
6 dis-tress arising from a defendant's negligent conduct. *Molien, supra* at 924. In 1980,  
7 the California Supreme Court abolished the "physical injury" requirement. *Molien supra*,  
8 930; *Potter vs. Firestone Tire and Rubber* (1993) 6 Cal.4<sup>th</sup> 965, 986. Under this rule,  
9 one may recover for emotional distress suffered as the result of a negligent act that  
10 placed the plaintiff in fear for his personal well-being, regardless of whether there is any  
11 physical impact and regardless of whether the emotional distress is accompanied by any  
12 physical manifestation of injury. *Molien supra* at 924; *Burgess vs. Superior Court* (1992)  
13 2 Cal.4<sup>th</sup> 1064, 1074.<sup>19</sup> Damages for emotional distress may be recovered in a tort  
14 action for fraud. *Branch vs. Homefed Bank*(1992)6 Cal.App.4<sup>th</sup> 793, 799.

15 Further, all detriment proximately caused by the breach of a duty imposed  
16 by statute, as here, is compensable, including damages of emotional distress. *Pintor vs.*  
17 *Ong* (1989) 211 Cal.App.3<sup>rd</sup> 837, 841. It is not necessary that the plaintiff suffer other  
18 injury in addition to the emotional distress. *Pintor supra* at 845. For example, damages  
19 for emotional distress have been awarded for a breach of the duty imposed by Cal. Civil  
20 Code §2941, requiring reconveyance of real property after a debt secured by a deed of  
21 trust has been satis-fied. *Pintor at 841; this is part of the statutory scheme imposing a*  
22 *duty on trustees.*

23 In California, the courts have adopted a unitary concept of pain and  
24

25 \_\_\_\_\_  
26 <sup>19</sup> See 32 California Forms of Pleading and Practice §362.11 *et seq.*

1 suffering, without attempting to bifurcate them, and this term has been used ad applied  
2 to a plaintiff who may recover not only for physical pain but also for fright, nervousness,  
3 grief, anxiety, worry, mortification, shock m humiliation, indignity, embarrassment,  
4 apprehension, terror, ro ordeal. *Capelouto vs. Kaiser*(1972) 7 Cal. 3<sup>rd</sup> 889, 893. Medical  
5 testimony is not required. No definite method of calculation is prescribed by law by  
6 which to fix compensation for pain and suffering. It is required only that the award be  
7 just and reasonable in light of the evidence. *Garfoot vs. Avila*(1989)213 Cal.App.3<sup>rd</sup>  
8 1205. Lastly, a jury may compute pain and suffering damages by the per diem method  
9 by which damages are measured in terms of a stated number of dollars for specific  
10 period of time. *Beagle vs. Vasold*(1966) 65 Cal.2<sup>nd</sup> 166, 173.

11 This is exactly what Claimant did in calculating his damages. Although  
12 criticized by debtor, this is perfectly allowable in California. And the calculations were  
13 based on the severe emotional distress and shock as this matter was unrolling. See  
14 Declaration of Alan Moss filed herewith.

15 Claimant's right to emotional distress damages is clearly mandated by  
16 *Munger vs. Moore* (1970) 11 Cal.App.3<sup>rd</sup> 11, which held: "The measure of damages for  
17 a wrong other than breach of contract will be an amount sufficient to compensate the  
18 plaintiff for all detriment, foreseeable or otherwise, proximately occasioned by the  
19 defendant's wrong."

20 In *Spinks vs. Equity Residential Briarwood Apartments* (2009) 171  
21 Cal.App.4<sup>th</sup> 1004, 1040, a wrongful eviction case, the Court stated: "The recovery  
22 includes all consequential damages occasioned by the wrongful eviction(personal injury,  
23 including infliction of emotional distress, and property damage),,,and upon a proper  
24 showing of malice, punitive damages."

25 / / /

26

1           **C. FRAUD**

2           The Trust argues that Claimant cannot demonstrate that he suffered the  
3 damage element required of fraud because the statutory notices *illegally* issued by ETS,  
4 and which then caused significant and continuing damage to Claimant, have been  
5 withdrawn. Further, debtor argues that any damages incurred in fighting and reversing  
6 the foreclosure was caused, not by the illegal actions of the debtor itself, but by  
7 Claimant's default.

8           This argument is an affront to logic, propriety, the law, and just common  
9 sense and decency. And it ignores the basic facts that ETS acted illegally and in  
10 contravention of the California statutes when it did issue these two notices(Notice of  
11 Default and Notice of Trustee Sale) and, after selling Claimant's home, conveying the  
12 trust deed to the bank. That the notices have been withdrawn, and that Claimant's home  
13 has been returned to him *does not obviate all of the damage, including extreme*  
14 *emotional damage he incurred for the three plus years of litigating against a major*  
15 *corporation, with unlimited assets, to accomplish this. It is beyond cavil that the debtor*  
16 *would not have rescinded the notices nor reversed the sale absent this enormous amount*  
17 *of litigation.* Perhaps if debtor could demonstrate to this court that it voluntarily  
18 admitted its mistakes, withdrew these notices and reversed the sale of Claimant's home,  
19 thereby not necessitating all of this litigation, that might be one thing. But that is not the  
20 case or the truth. The fact is that debtor used every means at its disposal to attempt to  
21 bury Claimant, and did so for a period exceeding three years. Debtor attempts to  
22 circumvent this by arguing that the beneficiary was not ResCap, but this is fallacious at  
23 best. It was ResCap, as the servicer, who conducted this litigation, forced it to go on  
24 and on, and refused to concede the most basic facts which have now been admitted in  
25 this matter.

1           Likewise, even if Claimant was in default, which he wasn't, that did not  
2 cause ETS to violate the law. That violation, which caused all of claimant's damages,  
3 occurred only because of debtor's callous disregard for California law. Second, the  
4 debtor offers no competent evidence to this Court that the Claimant was in default at the  
5 time of these actions. Therefore, this argument is of no avail. And it cannot. Third, the  
6 argument ignores that Claimant has proved the elements necessary for fraud. Fourth,  
7 Claimant has set forth compensable damages. *See* Declaration of Alan Moss, filed  
8 herewith. Thus, Debtor has not advanced any theory to defeat the Fraud cause of  
9 action, and the damages flowing therefrom.

10           **6. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS (IIED)**

11           Lastly, debtor argues that Claimant cannot assert a cause of action for  
12 IIED.

13           Not one of these cases rises to the level of the instant case, wherein ETS  
14 deliberately and intentionally violated California statutes controlling the activities of  
15 trustees. This is categorically different than, and far more serious than, these four cases.  
16 None of them pointed to a violation of California law or could.

17           As pointed out above, the District Court in the BONYT litigation ruled that  
18 the IIED cause of action was viable.

19           Behavior may be considered outrageous if a defendant (1) abuses a relation  
20 or position that gives him power to damage the plaintiff's interest; (2) know the plaintiff  
21 is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably  
22 with the recognition that the acts are likely to result in illness through mental distress.  
23 *Agarwal vs. Johnson*(1979) 25 Cal.3<sup>rd</sup> 932, 946. Neither physical injury or monetary loss  
24 is required to be actionable. *Grimes vs. Carter* (1966) 241 Cal.App.2<sup>nd</sup> 694.

25           Severe emotional distress was found to exist in *Fletcher vs. Western Nat.*

1 *Life Ins. Co.*(1970) 10 Cal.App.3<sup>rd</sup> 376 even though testimony showed the plaintiff  
2 suffered no shock, horror, or similar physical effects and that most of his distress  
3 resulted from his unfortunate economic situation. The Court held it may "consist of any  
4 highly unpleasant mental reaction such as fright, grief, shame, humiliation,  
5 embarrassment, anger, chagrin, dis-appointment, and worry." P. 397. When this  
6 involved losing his home, all continuing for many months, this was adequate for IIED.<sup>20</sup>

7 Claimant'S Declaration in the ETS litigation is directly relevant on this point.

8  
9 Dated: April 23, 2017

10 Respectfully Submitted,

11  
12 ALAN MOSS

13  
14 Attorney *In Propria Personum*

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25 <sup>20</sup> See Witkin, 5 Summary of California Law, §452.  
26

## **PROOF OF SERVICE**

**COURT:** U.S. BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CASE NAME: *RESCAP*

ACTION NO.: BANKRUPTCY NO. 12-12020-MG(SDNY)

I am employed in the County of San Francisco, California. I am over the age of 18 and not a party to the within action. On this date, I served the following:

Claimant's Pre-Trial Memorandum Of Law Pursuant To Pre-Trial Order  
on the party(ies) set out in said document by causing a true copy thereof to be:

- 9 [ ] Telecopied via facsimile to the addressee's facsimile number listed below per CRC 2008(b).

10 [ X ] By U.S./FEDEX priority OVERNIGHT mail, by placing said document(s) in a sealed envelope with postage thereon fully prepaid, and then given to an agent of FEDEX or the U.S. Post Office.

11 [ ] By U.S. mail, Return Receipt Requested, by placing said document(s) in a sealed envelope with appropriate postage thereon fully prepaid and then placed in the designated office area for outgoing mail.

12 [ ] Delivered by hand to the person set forth below, or by handing said document in a sealed envelope to a messenger service for delivery as addressed.

and if mailed, addressed as follows and sent to the following address(es):

Hon. Martin Glenn(Chambers Copy)  
Judge of the U.S. Bankruptcy Court in and for the  
Southern District of New York  
Alexander Hamilton Custom House  
One Bowling Green  
New York New York 10004-1408

Clerk's Office(Filing Copy)  
U.S. Bankruptcy Court in and for the  
Southern District of New York  
Alexander Hamilton Custom House  
One Bowling Green  
New York New York 10004-1408

Morrison and Foerster LLP  
ATTN: Norman S. Rosenbaum  
250 West 55<sup>th</sup> Street  
New York New York 10019

1 I declare under penalty of perjury under the laws of the State of California  
2 that the foregoing is true and correct.  
3

4 Executed this 24th day of April, 2017, at San Francisco, California.  
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